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UNITED STATES OF AMERICA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

UNITED STATES OF AMERICA, **Plaintiff,** **vs.** **W.R. GRACE, HENRY A. ESCHENBACH, JACK W. WOLTER, WILLIAM J. McCAIG, ROBERT J. BETTACCHI, O. MARIO FAVORITO, ROBERT C. WALSH,** **Defendants.**	**CR 05-07-M-DWM** **GOVERNMENT'S CONSOLIDATED RESPONSE TO DEFENDANTS' RULE 29 MOTIONS**

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Each Defendant has filed a Motion for Judgment of Acquittal pursuant to Federal Rule of Criminal Procedure 29. For the following reasons, each Defendant's motion should be denied.[1]

I. The Evidence Demonstrates the Defendants' Intentional and Deliberate Conduct that Obstructed Government Agency Functions and Caused Releases of Asbestos that Endangered Libby Residents

Libby, Montana did not become a Superfund site by accident. Deliberate and intentional conduct on the part of W.R. Grace ("Grace") and the individual defendants caused the asbestos contamination to be spread throughout Libby and resulted in dangerous exposures to Libby citizens, and has in some cases resulted in asbestos related disease. As shown by the evidence at trial, the defendants engaged in a pattern of corporate secrecy about the hazardousness of its asbestos-contaminated vermiculite in both its dealings with government regulators and the Libby community—a pattern that began in the mid-1970s and continued until at least 2002. The manner and means of the defendants' corporate secrecy were consistent—minimize the nature and extent of the hazard; delay government investigations; and provide incomplete and false information. The motive was also obvious—keep Grace in the vermiculite business while at the same time avoiding liability for its hazardous products. The conspirators also remained remarkably

[1] The Government intends to file a Motion to Admit Redacted Exhibits that may effect the Government's positions on defendants Walsh's and McCaig's Motions for Judgment of Acquittal. If the Court denies the Government's motion, the Government will likely move the Court to dismiss the Superseding Indictment as to defendants Walsh and McCaig.

consistent—as shown through internal Grace documents—throughout the course of the conspiracy, although as with most conspiracies, the members did change over time.

The illegal agreement was put in motion long ago. The initial agreement might seem fairly typical of an industrial producer of construction products. Grace officials knew that their vermiculite was contaminated with asbestos; that exposure to the asbestos dust caused severe if not life-threatening health problems; and that, try as they might, they could not rid the vermiculite of asbestos fibers that would take to the air with little provocation. And they knew that the regulatory environment, at least in the workplace, was tightening. Under these pressures, the conspiracy began.

Grace officials had an advantage: they knew more about Libby tremolite and its effects than anyone. Certainly more than government regulators or Libby citizens knew. And so they decided to protect that information for the purpose of protecting their market share in construction products and avoiding corporate liabilities. Rather than telling the government about the true dangers of dealing with their asbestos contaminated vermiculite, they instead cited the low asbestos concentration of their vermiculite. When the government started looking at their operations, they pushed back. There was no need for more studies, they said, it will only confirm what everyone already knew – that high levels of exposure to asbestos was hazardous, that

there is tremolite contamination in Libby vermiculite, and that there *used to be* high level asbestos exposures to workers before a wet mill was installed in 1974. When Grace submitted information to the Environmental Protection Agency in 1983, it deceptively declared that they had "no reason to believe there is any risk associated with the current uses of Libby vermiculite-containing products." But the most important information went unspoken.

By 1990, the legal environment changed – it became illegal to knowingly expose people to releases of asbestos – not just commercially regulated types of asbestos – even outside the workplace. Grace was quietly getting out of the business of mining and marketing Libby vermiculite, and the Grace defendants were still committed to their strategy of corporate secrecy. With all they knew about the propensity of their vermiculite to release asbestos into the air and the hazards of exposure, nobody from Grace warned the residents of Libby about the vermiculite concentrate and waste mill tailings scattered across their town; nobody revealed that Grace had repaired and sanded Rainy Creek Road with waste mill tailings; nobody told the Parkers that the vermiculite concentrate Grace left on the Screening Plant property would release hazardous levels of asbestos as they disturbed it while building their nursery business, and while living and working on the property; nobody told the Burnetts or their customers and employees at Millworks West that the vermiculite concentrate and expanded

vermiculite waste Grace left throughout the Export Plant property would release hazardous levels of asbestos as they disturbed it while conducting a commercial board planing business on the property; and nobody cautioned the kids about playing under the bleachers at football games.

The silence was deadly. Rates of asbestos-related disease grew to alarming levels. A rare case of asbestosis was observed in a non-worker. Two non-workers died of mesothelioma. The town was unaware of the health hazard lurking in the vermiculite materials and at Grace, nobody said a word.

The Grace defendants were busy liquidating the Libby properties, some of which was sold to the Parkers and leased to the Burnetts. These fairly unsophisticated buyers or lessees were looking to make a deal on some surplus property. In keeping with their conspiratorial agreement, nobody from Grace told the Parkers about the dangers of the vermiculite concentrate all over the property – knee deep in some areas. Nobody said, as Grace knew, that you should never sweep or even disturb the vermiculite. Nobody said that your grandkids should probably not play around on the property, or that it was probably not a good idea to open a business and invite the public there. But that is what the Parkers did, and officials at Grace knew that. The Parkers lost everything, and now Mr. and Mrs. Parker have asbestos-related disease. So does Mel Burnett.

And there were post-1990 releases of asbestos into the ambient air. Not just the releases caused by the unknowing Parkers, Burnetts and residents of Libby, but by Grace. For instance, Grace tore down its facilities at the screening plant while the Parkers moved in, a very dusty process.

By late 1999, EPA arrived on the scene at Libby and Grace was forced to answer more pointed questions about vermiculite contamination. Instead of being truthful with EPA, they minimized, obfuscated, and lied. They said their vermiculite contained less than 1% asbestos, concealing the true nature of the hazard. They said the asbestos contamination problem at the mine had been resolved. When EPA requested information from Grace in February of 2000, they said they did not provide vermiculite to the public, even though it was all over town. They said workers did not regularly leave their facility with dust on their clothing when obviously they had. And most importantly, Grace failed to identify all the areas where mill tailings and concentrate were used around town, including the Middle School track and Plummer Elementary School ice rink. They failed to mention the tailings used to sand Rainy Creek Road. They failed to mention the contamination at the Bluffs and at the Flyway.

Meanwhile, Libby residents were still being exposed to asbestos contamination. Because Grace obfuscated the initial EPA inquiry, it took the agency longer to respond. Not just a little longer, but

substantially longer. Every minute, every day, and every month of continued exposure to this asbestos contamination endangered Libby residents with an increased risk of disease that accumulates over time. It never goes away. And Grace knew that.

These are fair inferences from the trial record that establish the existence of a conspiracy to accomplish two objects: defraud the EPA and NIOSH and knowingly endanger people. The corporate silence and pattern of half truths that embody this conspiracy may have started as a concern for the financial well-being of the corporation, but it grew to include illegal objects that came at a much higher cost. As explained below, the conspiracy was well-proven and should go to the jury with the substantive counts.

II. Standard of Review

Under Federal Rule of Criminal Procedure 29, the Court "must enter a judgment of acquittal on any offense for which the evidence is insufficient to sustain a conviction." Fed.R.Crim.P. 29(a). "The evidence is sufficient to support a conviction if 'viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *United States v. Milwitt*, 475 F.3d 1150, 1154 (9th Cir.2007) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). In circumstantial evidence cases, the denial of such a motion is not simply based on whether in the opinion of the trial judge "the

evidence fails to exclude every reasonable hypothesis but that of guilt, but rather whether the jury might reasonably so conclude." *Vick v. United States*, 216 F.2d 228, 232 (5th Cir. 1954).

III. The Government Proved a Conspiracy to Defraud the United States and Knowingly Cause Releases of Asbestos That Continued Through 2002.

What follows is a brief summary of Ninth Circuit conspiracy law. From there, we will discuss selected pieces of evidence from this trial that bear upon the major underlying issue in this trial: the defendants' agreement to commit environmental crimes and to obstruct the lawful functions of two federal agencies – EPA and NIOSH – from understanding and properly responding to the true hazardous nature of Grace's asbestos contaminated vermiculite.

A. The Conspiracy May Be Proven with Circumstantial Evidence That its Members Shared a Common Purpose to Perform and Benefit from the Illegal Objects of the Conspiracy.

"To prove a conspiracy under 18 U.S.C. § 371, the government must establish: (1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime." *United States v. Montgomery*, 384 F.3d 1050, 1062 (9th Cir.2004) (citation and internal quotation marks omitted); *United States v. Indelicato*, 800 F.2d 1482, 1483 (9th Cir.1986). The agreement need not be explicit; it may be inferred from the defendant's acts pursuant to a fraudulent scheme or

from other circumstantial evidence. *United States v. Thomas*, 586 F.2d 123, 132 (9th Cir.1978); *United States v. Oropeza*, 564 F.2d 316, 321 (9th Cir.1977). An inference of the existence of a conspiratorial agreement may also be drawn "if there be concert of action, all the parties working together understandingly, with a single design for the accomplishment of a common purpose." *United States v. Monroe*, 552 F.2d 860, 862-63 (9th Cir. 1977). It is sufficient if the conspirators knew or had reason to know of the scope of the conspiracy and that their own benefits depended on the success of the venture. *United States v. Romero*, 282 F.3d 683, 687 (9th Cir.2002).

"When the evidence establishes that a conspiracy exists, there is sufficient evidence to support a conviction for knowing participation in that conspiracy if the government is able to establish, beyond a reasonable doubt, 'even a slight connection' between the defendant and the conspiracy." *United States v. Alvarez*, 358 F.3d 1194, 1201 (9th Cir. 2004), *quoting United States v. Wiseman*, 25 F.3d 862, 865 (9th Cir. 1994). Once established, a conspiracy is presumed to continue until there is an affirmative evidence of abandonment, withdrawal, disavowal or defeat of the purposes of the conspiracy. *United States v. Little*, 752 F.2d 1420, 1449 (9th Cir. 1984).

Here the government charged and proved a conspiracy with two parts: to knowingly release asbestos into Libby air and to obstruct and frustrate the governmental functions of NIOSH and EPA in their efforts

to discover and resolve the contamination caused by Libby vermiculite. The scope of the agreement is inferred from many sources, but one must begin with the underlying agreement – corporate secrecy. Although this court has opined that corporate secrecy is not necessarily illegal, it certainly may be, particularly in the handling of a hazardous substance.

B. A Conspiracy May Pre-date the Enactment of One of its Illegal Objects, and the Rational Conduct of Business May Indeed Satisfy the Elements of Conspiracy Where Innocent Victims Were Knowingly Exposed to Hazardous Substances.

The Court in this case asked whether the defendants could form a conspiracy before its illegal object was enacted. The answer is "yes." *United States v. Inafuku*, 938 F.2d 972, 974 (9th Cir. 1991) (not a violation of *ex post facto* clause to apply the law as it exists at the end of the conspiracy); *United States v. Kubick*, 205 F.3d 1117, 1129 (9th Cir. 1999); *United States v. Leyvas*, 371 F.2d 714, 717 (9th Cir. 1967) (In applying *ex post facto* provision, continuing conspiracies are regarded as having been committed on the date of the last overt act."); *United States v. Hersch*, 297 F.3d 1233, 1244 (11th Cir. 2002) (*ex post facto* clause is not violated when a defendant is charged with a conspiracy that continues after the effective date of the statute); *United States v. Allemard*, 34 F.3d 923, 927 (10th Cir. 1994) ("We agree . . . that the conspirators could not have intended to violate a law when it did not exist . . . However, the government did not have to prove that the conspirators intended to violate the later version of the statute when

the conspiracy began. Instead, the government could simply prove that the conspirators adopted this second object after November 1988); and *United States v. Monaco*, 194 F.3d 381, 386 (2d Cir. 1999) (government may use pre-enactment evidence to demonstrate the conspiracy's genesis, its purpose, and its operation over time. . . A conviction for a continuing offense straddling enactment of a statute will not run afoul of the *Ex Post Facto* clause unless it was possible for the jury, following the court's instructions, to convict 'exclusively' on pre-enactment conduct) (citations omitted).

The holdings of *Inafuku, Hersch, Allemand* and *Monaco* make perfect sense. If two people agree to do something that may be immoral but still legal – in this case allowing Libby residents to be exposed to asbestos contaminated vermiculite – that agreement comes to full fruition as a conspiracy when they are pressed to either abandon that agreement or carry it forward in violation of the law. Here, they carried forward a conspiracy that was already illegal as to the original defrauding object, into the time period in which it was also illegal as to the second knowing endangerment object. They did little or nothing to alleviate the risk of harm to non-workers in Libby after 1990. Instead, they shielded themselves from liability and continued to protect their corporate knowledge of the hazardous nature of their product, admitted nothing damaging about Libby contamination, and continued to allow

workers and Libby residents to disturb vermiculite, thereby releasing asbestos into the air.

Finally, the Court here asked whether the government was merely indicting free enterprise. But the fact that the evidence may support a "less sinister conclusion is immaterial," because the government is not required to rule out "every conclusion save that of guilt." *United States v. Dent*, 149 F.3d 180, 188 (3d Cir. 1998). The question is whether the aggregate of the circumstantial evidence creates an inference that individuals joined together "with a single design for the accomplishment of a common purpose." *United States v. Monroe*, 552 F.2d 860, 862-63 (9th Cir. 1977). The evidence at trial is sufficient for a rational juror to so conclude. Moreover, as this Court noted in its working jury instructions (Dct. 1092, Instruction 4-W), "an overt act does not itself have to be unlawful. A lawful act may be an element of a conspiracy if it was done for the purpose of carrying out the conspiracy."

C. Reasonable Inferences from the Evidence Support a Finding of Conspiracy.

Numerous documents from as much as 40 years ago show that Grace officials recognized the problem with Libby vermiculite. The conspiracy, though, has to do with what they chose to do with that information. In the beginning, they chose to gather it and keep the most damaging information about their vermiculite to themselves. And as the evidence at trial showed, this pattern of concealment its internal knowledge continued.

As early as 1971, Grace became aware of the asbestos hazard at its Libby mine and the potential for adverse claims based on exposure. GX 7. Grace had to consider the potential for health issues related to tremolite asbestos contamination in its Libby vermiculite. On that issue, Eschenbach reported to Favorito and others that there appeared to be some controversy brewing about tremolite's similarity to crocidolite and its potential to cause health problems. He recommended that they gather a "bank of knowledge on Tremolite" to show that "Libby has no significant problems." GX 7.

To gather this "bank of knowledge," Eschenbach suggested that they find a scientist "sympathetic to our position." GX 11. They found Dr. Smith, and sought Peter Grace's authorization for the hamster study. GX 25; Tr. (Duecker) at 2996, 3087. Their agreement with Dr. Smith required no publication of the results without approval by Grace. GX 28. While they initially hoped that the asbestos contamination in their Libby vermiculite would be benign, Tr. (Becker) at 2701, they soon found otherwise. A significant number of the hamsters died of asbestos disease – "[a]pparently the animal choked to death since no healthy lung tissue remained." GX 46A; 167. Grace did not allow publication of the hamster study. Tr. (Yang) at 3369.

The defendants performed a wide variety of internal tests, including drop tests, splitter tests, which showed that their efforts to remove or bind the tremolite contamination did not work. The tests

showed that the vermiculite materials continued to release hazardous levels of asbestos even from low concentration materials. Drop Tests - GX 40; (Peronard) at 971-75; Tr. (Miller) at 1885-88; Tr. (Locke) at 3625-32; GX 48 Tr. (Miller) at 1890; Salting Tests - GX 70; Tr. (Miller) at 1912-16, 2569-70; (Yang) at 3526-28; Binders - GX 56; Tr. (Yang) at 3422, 3426; Tr. (Locke) at 3827-28.

In 1977, Wolter and others in the Zonolite Working Group discussed potential threats to continuing in the Zonolite business. GX 40A. They discussed a decision tree that acknowledged that Grace's tremolite asbestos was a "health hazard" and analyzed "unfortunate outside events" like increased knowledge that their product is harmful, bad publicity affecting their customers, loss of market share in insulation products, environmental agitators, and class action suits from Libby. GX 57A; Tr. (Becker) 2723-33. They discussed the prospects of changing their products, labeling for hazards, finding new markets where regulations were lax, even closing the Libby mine. GX 57B; GX 57C. Of course, these discussions are perfectly legitimate business discussions; however, it is the absence of a next step—to warn the government and the public about the hazard they were discussing—that makes these conversations evidence of the defendants' involvement in a conspiracy to defraud the government.

In view of tightening asbestos regulations, the only reasonable alternative, short of closing the mine, was to remove the asbestos from

their products. Wolter, Eschenbach, and Favorito were included in the confidential discussions with the dire warning from the Executive Vice President of Construction Products Division ("CPD") that "we could be faced with the need to immediately withdraw certain consumer products from the U.S. market and a requirement to affix 'hazardous' warning labels on many of the remaining industrial products." GX 76. They tried screening to remove the asbestos and binding agents to suppress the asbestos, but nothing worked. GX 153; Tr. (Becker) at 2774; GX 147A; Tr. (Yang) at 3422; GX 56, 57; Tr. (Venuti) at 4570-85; GX 539 A-J.

Meanwhile, Wolter and Eschenbach knew about the alarming rates of asbestos disease among the Libby workers. GX 41. Eschenbach also determined that there were "numerous cases" of asbestos related disease in Libby workers that were not present in the Enoree, South Carolina miners. GX 175. The Enbionics study completed for Eschenbach by Dr. Daniel Teitelbaum made clear the "different attack rates" between the Libby and South Carolina vermiculite mines. *Id.*

By 1980, it was clear that a core group of Grace managers were constructing a strategy to avoid heavier regulation of Libby vermiculite. When NIOSH proposed a study to follow up some of the health issues cropping up at the O.M. Scott plant that used Libby vermiculite, Locke, Eschenbach, Favorito, and Wolter planned their response to avoid "a lot of loose talk with serious implications" that might hurt Grace's

vermiculite business. GX 239. Their options included delay and slow things down, publish a preemptive study, go up the chain of command at NIOSH with their arguments against a study, "actively seek to turn off the sources of pressure," and apply political pressure. *Id.* General Counsel for Grace, Mario Favorito put the plan into action in a series of letters to NIOSH and MSHA. GX 246; GX 250; GX 255; GX 263; GX 266. Ultimately the strategies they employed – slowing things down and repeating their arguments to a wider audience – succeeded in delaying the NIOSH Study for 17 months. GX 239; GX 305. These core conspirators revealed their willingness to control information about the harmfulness of their Libby vermiculite and to protect that business even if it exposed workers and the public to asbestos.

In addition to receiving attention from NIOSH, Grace also began to receive inquiries from EPA. Prompted by O.M. Scott's voluntary reporting of the bloody pleural effusions suffered by its workers, in the early 1980s, EPA sought information about asbestos contaminated vermiculite from Grace. As shown in several successive exhibits introduced by the defendants regarding EPA inquiries and studies in the early 1980s, Grace asserted the familiar theme that although it was generally known that historic exposures to asbestos contaminated vermiculite had injured workers, it had lowered the concentration of asbestos in its concentrate, and that the 1974 installation of the wet mill had resolved its historic exposure issues. *See, e.g.*, GX 215 p. 05-06,

08; GX 220 p. 19-20; 05-06, 08; Tr. (Miller) at 2315-16; Tr. (Kover) at 5931-34. This was directly inconsistent with what it knew from its own historic testing in the late 1970s and early 1980s.

In 1981, Wolter, McCaig and Grace became aware of the harmfulness of mine tailings used around Libby. As a senior Grace chemist explained, the mine tailings and stoner rock refuse had the highest concentrations of asbestos. Tr. (Yang) at 3548. Because this material was used to sand and repair Rainy Creek Road, McCaig notified employees to roll up windows when driving to avoid "unnecessary exposure to tremolite contaminated dust from the roadbed." GX 228A. McCaig also learned in 1981 that the "course tails" that Grace had donated to surface the high school and junior high school running tracks released "surprisingly high" levels of dangerous airborne asbestos during Grace testing that collected air samples while two people ran around the track. GX 267; Tr. (Geiger) at 5270-72. That is also why McCaig recommended, and Wolter authorized, the resurfacing of the tracks. GX 271. Here again, Grace became aware of the hazard, but this time it was a hazard to the Libby community.

In 1983, when Grace finally made its initial submission about its vermiculite to EPA under Section 8(e) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2607(e), Eschenbach, consistent with the core conspirators' earlier responses to NIOSH and EPA, obfuscated further. He said, "[W]e have no reason to believe there is any risk associated

with current uses of Libby vermiculite-containing products." GX 333. But they did. This statement was directly inconsistent with the results of its own internal testing showing that its products released high levels of airborne fibers even at low concentrations. Drop Tests - GX 40; (Peronard) at 971-75; Tr. (Miller) at 1885-88; Tr. (Locke) at 3625-32; GX 48 Tr. (Miller) at 1890; Salting Tests - GX 70; Tr. (Miller) at 1912-16, 2569-70; (Yang) at 3526-28; Binders - GX 56; Tr. (Yang) at 3422, 3426; Tr. (Locke) at 3827-28.

Eschenbach repeated the theme that the adverse health information he was submitting was only related to past exposures, and claimed that Grace was reporting only "preliminary data" and that "[a]t this time we do not have sufficient medical information or sufficient occupational and personal history data in these cases to make a judgment as to the cause of these illnesses." GX 333-02-03. But this too was misleading. Eschenbach failed to disclose the July 28, 1982 Mortality Study of Grace workers performed by Dr. Richard Monson of the Harvard School of Public Health, which concluded that "the data in this report are consistent with excess death due to respiratory cancer as a result of exposure to asbestos." GX 314-03. Eschenbach also failed to disclose to EPA the Enbionics study, (GX 175), which showed that Libby vermiculite workers were suffering many more lung abnormalities than the vermiculite workers in its South Carolina mine that did not contain fibrous tremolite. This is one of the very questions that both EPA and

NIOSH had wanted to investigate in order to understand the unknown effects of vermiculite itself or tremolite contaminated vermiculite. GX 256; Tr. (K. Kennedy) at 5493.

Eschenbach also failed to disclose the Fairleigh-Dickenson hamster study. Grace carefully designed the study to mimic the exact fiber sizes of the asbestos in worker air samples at Libby in order to determine how asbestos in Libby vermiculite compared to animal toxicity tests to publicly reported animal tests of tremolite-talc deposits elsewhere. Tr. (Yang) at 3472-73. As Grace's senior chemist explained, "Our material is maybe quite different than the one has been tested. If you really want to know the truth, you have to try it." Tr. (Yang) at 3458. The relative toxicity of these various types of asbestos contaminated materials was of great interest to public health researchers, industry and governmental officials. Grace monitored these proceedings closely, and watched as Dr. Smith presented the varying results of animal studies he had performed on tremolite contaminated talc materials. GX 148B, Tr. (Yang) 3481-86. Yet when their own hamster study was complete, Grace would not allow Dr. Smith to publish his findings that the tremolite from Libby was on the toxic side of the tremolite contaminated mined materials ledger and comparable to commercial types of asbestos. Tr. (Duecker) at 3058. They did not report the hamster study to the EPA until 1992 – two

years after Grace closed down the Libby mine. GX 595; Tr. (Kover) at 5897.

Meanwhile, Grace was coming to grips with the problems it faces in the market place due to the tremolite contamination of its vermiculite. In 1983, Bettacchi wrote to Walsh and others in CPD that "tremolite contamination of vermiculite based products continues as a pregnant issue in the marketplace." GX 373. Later in the memo, Bettacchi recognized that Grace faced future problems due to asbestos related litigation. *Id*. During mid to late 1980s, in his position as the Vice President of CPD, Bettacchi was the person responsible for marketing of all the vermiculite products, as well as dealing with issues related to tremolite asbestos. Tr. (Venuti) at 4603. In fact, Bettacchi was the "key point person when it came to dealing with asbestos-related issues." Tr. (Venuti) at 4827.

So by the 1980s, Grace and the conspirators knew of the hazards of Libby vermiculite concentrate and mill tailings in their mining and expanding operations, as well as in the community. In spite of this, nothing was done to warn the community. Libby residents were being exposed to asbestos contaminated vermiculite concentrate and waste mill tailings all around them. It was in their homes, yards and gardens; it was at the ballfields; it was around the track; it was under the bleachers; it was on Rainy Creek Road, and down by the old fishing hole next to the Screening Plant. Tr. (O'Brien) at 353; Tr. (Foote) at 396.

Kids chewed on it. Tr. (Challinor) at 429. It was "kind of everywhere," because "it blows around." Tr. (Cannon) at 280-81. There was no effort to keep people away from it, even at the Export Plant. Tr. (Herreid) at 359-60. And yet, in 2001, Grace had the temerity to suggest that "we had no reason to believe that there was a continuing environmental problem in the community." GX 640.

It would be fair for the jury to infer that the Grace conspirators said and did nothing about the dangers of exposure in Libby to asbestos contaminated vermiculite and mine tailings because they were trying to sell or give away the mine property and avoid liabilities. In 1993, Wolter informs Bettacchi about the status of the sale of the Libby assets, which includes Stringer's assessment that if Grace is going to transfer all of its future liabilities associated with the properties, it will have to be willing to sell to some small organization. GX 608. Stringer and Wolter also were involved in the donation of the Export Property to the city, including the little league field, with no warning whatsoever about the asbestos hazard. GX 606. Bettacchi signed the deed. GX 612; GX 620. Wolter and Stringer negotiated the sale of the screening plant to the Parkers, and Bettacchi again signed the deed. GX 610; Tr (M. Parker) at 1164, 1174. Nobody mentioned the asbestos hazard to the Parkers. *Id*. at 1152, 1318.

When the problem was reported in the Seattle paper, EPA arrived to investigate and the Grace conspirators stuck to their story. In

response to the EPA request for information under 15 U.S.C. § 104(e) ("104(e) Request") in 2000, Stringer failed to reveal nearly any of the contamination that was everywhere around town. Tr. (Peronard) at 724-730. During a tour with Peronard, Stringer reiterated that the vermiculite concentrate and ore were less than 1% asbestos, and did not present a threat that justified any clean up action. Tr. (Peronard) at 547-48. This was the company line for years. These final acts of deceit and obfuscation caused delay, and because it caused delay, it increased the community's continuing exposure to a hazardous air pollutant. *Id.* at 731. Each exposure aggravates existing damage due to prior exposures, Tr. (Miller) at 2533, and each exposure is cumulative. Tr. (Miller) at 1872; Tr. (Lemen) at 6195-97.

It would be fair for the jury to infer that the false responses to the EPA 104(e) request for information and other false information given to the EPA response team were merely a continuation of what the Grace conspirators had been doing for years. They cited compliance with workplace standards, argued that the asbestos contamination was low, and they completely failed to reveal either the extent of the asbestos contamination across Libby, or the toxicity of that contamination. These false statements and omissions and resulting community exposures caused by the delay to EPA's response satisfy both objects of the conspiracy.

The defendants in this proceeding have offered a construction of the facts to suggest that their actions were businesslike and perhaps even reasonable. Indeed, the defendants have argued that they were just "in business" together and it would be improper to draw the inference of concerted conspiratorial action simply from the fact that they were business colleagues who exchanged memos. Under this theory, apparently no evidence of internal business communications would ever be relevant to prove a conspiracy, even if the result of the business practices endangered lives. Lawfully operating businesses do not wake up and realize that they have been donating asbestos-contaminated mine tailings for use at the local schools' tracks and then attempt to pave the problem over. Lawfully operating businesses do not produce study after study on the toxicity of their products and then hide them from regulators. Lawfully operating businesses do not employ delay tactics to prevent regulators from conducting health studies designed to protect their workers. Lawfully operating businesses do not sell and lease asbestos-contaminated properties to unsuspecting, small businesses and families.

The argument about whether CPD's vermiculite business was legitimate or involved a criminal agreement is for the jury. *See United States v. Dent*, 149 F.3d 180, 188 (3d Cir. 1998). The foregoing facts support reasonable inferences that show that Grace and individual defendants agreed to gather information about the hazardous nature of

their asbestos contaminated vermiculite, keep the damaging information secret, and ignore and hide the airborne asbestos hazard they had created in Libby. The agreement to obstruct EPA was an illegal object from the inception of the conspiracy to its end. The agreement to knowingly endanger became a second illegal object of the conspiracy when the knowing endangerment statute was enacted in 1990. The Rule 29 motions on Count I should be denied.

IV. The Government has Submitted Ample Evidence for the Knowing Endangerment Counts to Be Submitted to the Jury

The knowing releases of asbestos in Counts II through IV in this case occurred in either of two ways. Grace either sold or donated asbestos contaminated property to unsuspecting parties, or Grace distributed asbestos contaminated material to Libby residents. In each instance, the government relies on the theory of liability under 18 U.S.C. § 2, which this Court has recognized as a viable legal theory. *United States v. W.R. Grace*, 434 F.Supp. 879, 844-45 (D.Mont. 2006); Text Order Doc. 727 (8/16/2006). To establish this crime, the United States, must show that the defendants "willfully caused to be released into the ambient air" asbestos. The government must also show that the defendants knew they were thereby placing a person in imminent danger of serious bodily harm.

The totality of factual evidence and expert opinion testimony is more than sufficient to support the elements of proof necessary to prove

the Clean Air Act knowing endangerment counts in this case. The level of proof provided in this case is equal to if not substantially greater than levels of proof that were found sufficient to sustain convictions in other criminal environmental knowing endangerment prosecutions.

Dr. Whitehouse provided expert testimony regarding specific causation[2] as it relates to Libby residents that have suffered asbestos related disease due in large part to defendants' conduct, including his opinion that the repeated asbestos exposures experienced by Mel and Lerah Parker while they were living, working and playing on the Screening Plant property from 1993 and in to May 2000 caused the progressive asbestos related disease he diagnosed for each of them. When asked during cross-examination what the exact level of exposure that Mrs. Parker was exposed to, Dr. Whitehouse explained that, "I know it was enough to give her disease." Tr. (Whitehouse) at 1676. Dr. Whitehouse rendered a similar opinion with regard to his diagnosis and evaluation of Mel Burnett, who is now suffering from asbestos related disease due to his exposures at the Export Plant property from 1987 to

[2] It is not necessary in criminal or civil environmental knowing endangerment cases to prove that death or serious bodily injury actually occurred. *United States v. Protex Industries, Inc.*, 874 F.2d 740, 744 (10th Cir. 1988) (RCRA criminal knowing endangerment case); *Price v. United States Navy*, (9th Cir. 1994) ("Courts have also consistently held that 'endangerment' means a threatened or potential harm does not require proof of actual harm") (citations omitted); *Burlington Northern and Santa Fe Railway Co. v. Grant*, 505 F.3d 1013, 1020-21 (10th Cir. 2007) (imminent and substantial endangerment under RCRA does not require proof of actual harm to health or environment). However, where proof of actual harm exists, as it did in both the *Elias* and *Protex* criminal knowing endangerment cases, it is direct proof of endangerment. *Elias*, 269 F.3d at 1014; *Protex*, 874 F.2d at 742.

the summer of 2000. Finally, Dr. Whitehouse testified regarding his longstanding observations of the extent of asbestos related disease he has observed in Libby residents resulting from a wide variety of occupational and non-occupational exposures to Grace's asbestos contaminated vermiculite.

Dr. Whitehouse's opinion regarding the Parkers and Mel Burnett is similar to the proof found sufficient to sustain a RCRA knowing endangerment conviction in United States v. Elias, 269 F.3d 1003, 1008 (9th Cir. 2001). The Ninth Circuit rejected Elias' claim that the government had not done enough sampling of the cyanide laced sludge inside and outside a tank in which an employee had been exposed and suffered brain damage to establish that the "average properties" of the entire tank of sludge:

> On a more basic level, we think Elias's hypertechnical interpretation contravenes common sense. . . .
> If a sample from one part of the tank contains wastes reactive enough to cause brain damage to someone, there can be no conceivable purpose in sending other people into the tank to extract more samples.

Id. at 1014. The Ninth Circuit further rejected defendant's claim that RCRA's definition of reactive cyanide bearing hazardous waste was void for vagueness because it did not include a numerically quantifiable test:

> At the end of the day, the question is whether a reasonable person who knew cyanide had previously been stored in the tank and who was aware of previous health complaints by those working with or near the substance would have known that the sludge in Elias's tank was dangerous to human health.

Id. at 1017. In this case, the Defendants similarly knew that exposure to asbestos contaminated vermiculite had caused numerous cases of asbestos related disease in workers and non-workers who had the misfortune of working or being near the hazardous air pollutants being released from the material whenever disturbed.

The collective opinions of Drs. Miller, Lockey and Lemen provide additional evidence that the defendants' knowing distribution of asbestos contaminated vermiculite throughout the town of Libby placed Libby residents in imminent danger of death or serious bodily injury. Collectively, their opinions show that residents who had the misfortune of being in proximity to the asbestos contaminated vermiculite up and through the year 2000 were subjected to repeated, cumulative exposures that increased their risk with each disturbance.

The proof supplied during the government's case in chief is clearly equal to or greater than the proof found sufficient to sustain other criminal knowing endangerment cases. Cf., Elias; Protex, 874 F.2d at 742; United States v. Hylton, 2009 WL 136867 at *2 (10th Cir. 2009) and United States v. Little at *3, 2009 WL 136864 (10th Cir. 2009) (CAA knowing endangerment case finding evidence sufficient to sustain conviction despite defense claims that none of the Government witnesses could testify, with certainty, that the inmates would experience serious bodily injury or death as a result of their exposure to asbestos in the depot).

An additional criminal knowing endangerment case demonstrates that the type of evidence of endangerment presented by the government in this case is more than sufficient to present to the knowing endangerment charges to the jury. In United States v. Hansen, 262 F.3d 1217 (11th Cir. 2001), a RCRA knowing endangerment case, the Eleventh Circuit found sufficient the government's evidence, which included (1) former company employee testimony that they suffered serious skin and respiratory conditions from the high pH wastewater on the cellroom floors; (2) internal memos showing defendants' awareness of the need to make repairs to avert severe safety and environmental problems; (3) urinalysis testing on employees showing increased mercury levels that exceeded action levels; (4) expert testimony and reports linking exposure to mercury and caustic to a variety of serious medical problems; and (5) the expert testimony of Dr. Daniel Teitelbaum that "the employees were in danger of death or serious bodily injury." Id. at 1243-44.

Accordingly, the evidence here is sufficient to sustain a conviction of the charged defendants for Clean Air Act knowing endangerment, and those charges should be submitted to the jury.

Grace distributed asbestos contaminated vermiculite materials in the Libby community in a manner that created many pathways for airborne exposure to unsuspecting Libby residents. Grace also knew that, upon disturbance, these vermiculite materials would release

hazardous levels of asbestos into the air. Despite this knowledge, Grace knowingly left the materials in locations where Libby residents could easily disturb the materials, causing repeated releases of repeated asbestos, repeated additional exposures, and resulting increased risk of serious bodily harm or death.

Grace distributed these asbestos contaminated vermiculite materials in the community in a variety of ways. In 1976, Grace managers, including Wolter, pondered whether their activities might be posing a serious hazard to the town's population GX 41-1. They exchanged memos establishing that they were aware that asbestos laden dust carried home by workers cause exposures to workers' families GX 108-20-21. They failed to provide adequate showers or changing facilities. Grace employees worked in very dusty conditions, and went home with asbestos dust on their clothes. Tr. (Zwang) at 5017-18; Tr. (Beagle) at 5038; Tr. (Thom) at 5304.

Grace provided mill tailings – waste materials it knew contained among the highest concentrations of asbestos of any of its vermiculite materials – to be used as a foundation for an outdoor skating rink at Plummer Elementary School. Although Grace tried to take some of the material back because they knew the danger it posed, Grace left behind much of the tailings, exposing the teachers and students who played nearby and in the skating rink base, disturbing the materials on an

almost daily basis. Tr. (Kelsch) at 5112-5114, 5116-5117; (Peronard) at 878, 884-85; GX 705.

Grace also provided tailings for use on the Libby Junior High and Senior High School running tracks. It knew, after sending one of its employees to measure the amount of airborne asbestos released while running on the high school track, that the materials released "surprisingly high levels" of asbestos while two people were running on the track. Tr. (Geiger) at 5271-74; GX 267-1. After estimating the cost of removing and replacing both the Junior High and Senior High School running tracks, Tr. (Geiger) at 5277; GX 267-3, Grace failed to remove the mill tailings from the running tracks, instead choosing to resurface the tracks. GX 271. This effort was incomplete and ineffective. Tailings were left exposed around the edges of the track and in locations adjacent to the track. EPA on-scene coordinator Paul Peronard in 2001 found asbestos to be widely present under and around the Senior High School track, underneath the grandstand areas, and on athletic equipment used in the field of play. Tr. (Peronard) at 868-69 and 878-81; GX 693. Peronard also found asbestos at the Libby Junior High School track. Tr. (Peronard) at 883; GX 698.

Grace allowed workers and non-worker Libby residents to have free access to asbestos contaminated vermiculite concentrate materials to take home for use in their gardens and yards. Tr. (Zwang) at 5013-14; (Thom) at 5302-03. They provided waste vermiculite concentrate

materials during the Export Plant tear down to Lincoln County, which unwittingly used the materials in its County compost program under the false assurance that the materials were safe because the concentration of asbestos in the materials was less than one percent. Tr. (Anderson) at 454-56; (Peronard) at 893-95.

Grace caused this widespread distribution of asbestos contaminated vermiculite in the Libby community with the knowledge that these materials were capable of releasing high levels of asbestos whenever the materials were disturbed. Grace had spent a couple of decades learning how dangerous its asbestos contaminated vermiculite could be. Grace knew that these materials caused a wide variety of asbestos related diseases among Grace workers and their family members. GX 484; GX 629B. Grace knew, from a study done by Dr. Lockey that pleural changes in the lungs of workers result from "low cumulative fiber exposure." GX 428. Grace knew from decades of effort how difficult it was to control releases of asbestos in their workplace environments and the workplace of their industrial customers, even with the aid of sophisticated engineering controls and wetting or binding efforts.

Despite this knowledge, Grace caused their asbestos contaminated vermiculite materials to be freely distributed in a manner that would expose, without warning, unprotected families and non-workers throughout the Libby community. As Paul Peronard and government

experts explained, Grace's conduct resulted in the creation of many additional complete pathways of exposure to asbestos among the Libby community, thereby placing those residents at increased risk of serious bodily injury or death. Tr. (Peronard) at 1265-67; GX 714; Tr. (Miller) at 2037-42, Tr. (Whitehouse) at 1568-69, 1571-73, 1590-91; and Tr. (Lemen) at 6195-97.

With regard to Counts III and IV, Grace, Bettacchi, Wolter, and Alan Stringer worked together to dispose of the Libby mining, milling and processing properties, all with knowledge that those properties were contaminated with asbestos. They sought to sell the properties to large mining companies such as Phelps Dodge and the 3M Company, to no avail. GX 608. 3M declined to buy the properties due to environmental liability concerns. GX 586. Wolter, in a letter to Grace Senior Management, copied to Bettacchi, forwards Stringer's status report on the progress of their attempts to sell Grace's Libby assets, including the mine and processing properties. Stringer concludes at the end of his report that:

> For the same reason 3M would not buy the mine, I doubt that any other large corporation will come forward with an offer to buy the entire property. If Grace is going to be able to transfer all of the future responsibilities and liabilities to someone else, they are going to have to be willing to sell to some small organization. To someone who wants the property for more than just turning a profit."

GX 608-52.

Grace, Bettacchi, Wolter and Stringer proceeded with Stringer's plan to sell the Grace properties to small organizations, even though they knew the properties remained contaminated with asbestos, and that larger companies would not buy the properties due to environmental liability concerns. In 1993, Grace signaled its intent to donate the Export Plant property to the City of Libby. GX 606, and in 1994, executed the donation through a deed signed by Bettacchi. GX 620; Tr. (Burnett) at 5993. Baseball players, coaches and fans were exposed for years to asbestos contaminated vermiculite materials on and around the ballfield locations. They had no idea that the asbestos-contaminated vermiculite materials around the ballfield areas were dangerous. Tr. (Foote) at 389-390, 394-95; Tr. (Cannon) at 281; Tr. (O'Brien) at 353. The contamination was still there when EPA arrived. Tr. (Peronard) at 797-98; GX 682.

Grace also leased the portion of the Export Plant that contained commercial buildings to local businesses, including Mon-Ida and Millworks West. Tr. at 5980; Tr. (Burnett) 5986-87; 5989. In 1995, in another deed transfer signed by Bettacchi, this portion of the Export Plant was also donated to the City of Libby. GX 612. Burnett observed that vermiculite materials left over from the Grace Export Plant operations were scattered throughout the property, both inside and out, and that he, his employees and the customers of his retail lumber business were walking through and driving over these materials on a

daily basis. Grace officials never told Burnett about the hazardous nature of the vermiculite materials, and Burnett did not know he should avoid disturbing these hazardous materials. Tr. (Burnett) at 5990. Unfortunately, Mel Burnett has been diagnosed with asbestos related disease. Tr. (Burnett) at 6003; Tr. (Whitehouse) at 1625.

By late 1999 and 2000, broken and unsecured bags of vermiculite product still remained outside on the Export Plant property. Tr. (Anderson) at 467-470; Tr. (Peronard) at 734-36; GX 627, 627A and 627B. EPA sampling revealed extensive presence of asbestos at the site. Tr. (Peronard) at 797-98; GX 682; Tr. (Miller) at 1851-52, GX 752A.

Peronard did not immediately remove the Burnetts and their business from the site because he did not appreciate how dangerous the asbestos contaminated vermiculite material was. The Burnetts were not totally removed from the property until Summer of 2000. Tr. (Peronard) at 1263-64: (Burnett) at 5998-6000. Peronard was misled in November 1999 by the efforts of Grace and Stringer to downplay the hazardous nature of these materials, and it took him some time and effort in the spring of 2000 in reviewing Grace historic documents and performing his own sampling and analysis to realize the full extent of the hazard posed to the Burnetts, the Millwork West Workers, and customers of the business. Tr. (Peronard) at 1228-29 and 1263-64.

The same group of defendants – Grace, Bettacchi, Wolter, with the assistance of co-conspirator Alan Stringer – sought to sell the Screening

Plant property to yet another small family business in 1992. Defendants were aware that large piles of vermiculite concentrate remained strewn around the Screening Plant property during and after their tear down of buildings at the site. Tr. (Beagle) at 5034-35; Tr. (Thom) at 5301-02; Tr. (DeShazer) at 5589-90 and 5592. They also knew that their prospective purchasers – Mel and Lerah Parker – were planning to purchase the property for use as a commercial nursery business. Tr. (Mel Parker) at 1320-21, 1337; Tr, (Lerah Parker) at 1513-14.

In December 1992, without disclosing Grace's knowledge of the health hazards associated with disturbance of the asbestos contaminated vermiculite concentrate left on the property, Stringer signed an Agreement to Sell the Screening Plant to the Parkers. GX 604; Tr. (Mel Parker) at 1333-34; 1335-37; Tr. (Lerah Parker) at 1513-14; Tr. (DeShazer) at 5590-93.

The Agreement to Sell was formalized a year later in December 1993 with the execution of a deed, signed by Bettacchi, transferring the properties to the Parkers. GX 610. Stringer, Wolter and Bettacchi knew the Parkers were living and working on the property. No one said a word about the hazardous contamination, even though, it was obvious to Lerah Parker that they knew. When Mrs. Parker confronted Stringer, he "just put his coffee down and left." Tr. (Lerah Parker) at 1549-50; Tr. (Mel Parker) at 1345.

Mel and Lerah Parker, their family, employees and customers breathed asbestos released from the asbestos contaminated vermiculite materials the defendants left on the Screening Plant from approximately November, 1992 (GX 604) until the EPA gated the property and prohibited access by the Parkers and the public in May, 2000.

The Parkers moved onto the Screening Plant property gradually while the tear down was ongoing. Tr. (M. Parker) 1340-41; GX 610. Grace left vermiculite concentrate on the Screening Plant property. Tr. (M. Parker) at 1491; GX 738. Once moved onto the property, the Parkers set about building their nursery business into one of the largest in Montana. Tr. (M. Parker) at 1389; GX 785. Their efforts included shoveling the vermiculite concentrate into buckets, using a tractor to transport the vermiculite concentrate around the property, building a horse and carriage walking path around the property from vermiculite concentrate and shoveling vermiculite concentrate into large flower beds. Tr. (L. Parker) at 1527. Approximately four to five times every year, the Parkers and several of their employees swept the long shed with shop brooms. Tr. (M. Parker) at 1364-67. No one told the Parkers they should not be using brooms to sweep the long shed. *Cf.* GX 290 (Grace memo telling expansion plant workers to throw away all brooms). The Parkers used the long shed for a vehicle storage business. Tr. (L. Parker) at 1517.

The family worked hard on the property surrounded by asbestos contaminated vermiculite materials. Grandchildren visited regularly and played in the Parkers yard surrounded by visible asbestos contaminated vermiculite. Tr. (L. Parker) at 1529**.** The Parkers' daughter, Lerah Castleton, and her daughter, Katy, walked through vermiculite materials, played with vermiculite materials including throwing pieces of vermiculite against the wall. Tr. (Castleton) at 5078; Tr. (Peronard) at 724-25.

The Parkers also were exposed throughout every day to dust laden with asbestos raised from Rainy Creek Road by logging trucks and blown onto the Screening Plant in rolling clouds as late as April, 2000 Tr. (L. Parker) at 1528-31, 1538-42; Tr. (Castleton) at 5075-76, 5078-79, 5081-82; GX 735.

Both Mel and Lerah Parker have been diagnosed with asbestos related lung disease Tr. (L. Parker) at 1553; (M. Parker) at 1386; Tr. (Whitehouse) at1620-21; 1623-24.

From all of the foregoing, the jury could reasonably infer that Grace and the individual defendants knew that exposure to asbestos contaminated vermiculite in the ambient air presented an imminent danger. But these inferences are even more reasonable when you consider that Grace and the individual defendants knew more than anyone else. They actively gathered data and studied the literature. *See* GX 7; GX 428. Long before EPA arrived, the defendants knew that

the asbestos contaminated vermiculite materials released asbestos into the ambient air when disturbed and were an imminent danger to the Libby community and its residents.

Four well qualified experts described the imminent health hazards faced by Libby residents due to their exposures to asbestos contaminated vermiculite materials after the mine shut down in 1990:

(1) Dr. Aubrey Miller, a medical doctor and toxicologist who had worked on the Libby Superfund investigation, explained that the asbestos contaminated vermiculite at the three locations at issue in the Superseding Indictment - The Screening Plant, the Export Plant, and the Libby Community - as EPA found it in late 1999 and into summer of 2000, constituted an imminent endangerment to those residents. Tr. (Miller) at 2037-2042.

(2) Dr. Alan Whitehouse described his long time and evolving observation of asbestos related lung disease suffered by Libby mine workers, family members, and Libby residents with no connection to the mine who had been exposed to asbestos contaminated vermiculite through the multiple pathways of exposure present in the Libby community as a result of Grace's conduct. Tr. (Whitehouse)1568-69; 1571-73; 1590-91. He also specifically described his diagnosis of the Parkers, (Tr. (L. Parker)1620-21; Tr. (M. Parker) 1623-24) and Mel Burnett (Tr. (Mel Burnett) at 1625), and opined that their asbestos related

diseases were the result of their respective exposures at the Screening and Export Plant properties. Tr. (Whitehouse) at 1638.

(3) Dr. James Lockey explained his studies (1984 and 2008) of lung disease found in O.M. Scott workers that had utilized Libby vermiculite concentrate as an ingredient in OM Scott's horticultural products. According to Dr. Lockey, his studies showed that relatively low level exposures to the asbestos contaminated vermiculite concentrate materials resulted in increased risk of lung disease and abnormalities, including bloody pleural effusions. Tr. (Lockey) at 5754-55.

(4) Dr. Richard Lemen found that the exposures to asbestos contaminated vermiculite materials in the Libby community through multiple pathways of exposure that continued to exist in Libby constituted an imminent health risk to Libby residents. He explained that as an individual breathes asbestos, the asbestos accumulates in their lungs. Each exposure adds more asbestos and increases the risk of asbestos related disease. The only way to end the risk is to remove the sources of exposure. Tr. (Lemen) at 6195-97.

The Government has provided ample evidence for any rational trier of fact to find the defendants guilty of causing releases of asbestos after November 1999 that they knew would place innocent people at risk of serious bodily injury. When viewed, as required at this stage of

the proceeding, in the light most favorable to the government, the evidence of all defendants' guilt is overwhelming. A jury must be allowed to consider the guilt or innocence of the defendants. Therefore, each of the defendants' Rule 29 motions on the knowing endangerment counts II through IV should be denied.

V. The Government Adduced Ample Evidence of Obstruction as Charged in Counts V - VIII

In November 1999, life in Libby was interrupted by a news story in the Seattle Post Intelligencer describing high rates of asbestos related disease in the small community. Tr. (Peronard) at 681-82. Alerted to the story, the EPA assigned Paul Peronard, one of its most senior On-Scene Coordinators from its Denver office, to respond. *Id.* Mr. Peronard arrived in Libby on November 23, 1999, joined other members of his response team, and met with former Grace mine manager Alan Stringer, who was serving as Grace's representative in Libby. Tr. (Peronard) at 683, 696.

Mr. Peronard's initial investigation focused on gathering information including "what materials [Grace] might have generated and where they ended up." Tr. (Peronard) at 697, 742. As part of his investigation, Peronard took a tour of the mine site with Stringer. During the tour, Stringer described the mining operations, as well as vermiculite being mined that was contaminated, according to Stringer, with what he called "asbestos or tremolite." Tr. (Peronard) at 705-07; GX 808.

At the outset of their dealings with Peronard, Stringer and Grace minimized the hazardous nature of the vermiculite materials, the extent of the asbestos contamination around Libby, and the amount of asbestos in the vermiculite. In their first meeting, Stringer, without being asked, handed Peronard a sheet of air samples showing low asbestos releases into the air from different points on Rainy Creek Road. Stringer sent a similar set of air samples from Rainy Creek Road to the City of Libby in 1992. GX 596. Tr. (Anderson) at 451; Tr. (Peronard) at 708-10, 712-13; GX 601A. When discussing the piles of vermiculite Peronard observed on the Parkers' property, Stringer told him "it was vermiculite concentrate left behind from the operations and it was less than 1 percent asbestos," which is why "they didn't feel a need to do anything with it." Tr. (Peronard) at 728. Of course, Stringer knew that the vermiculite left on the screening plant, regardless of the percentage of asbestos, was harmful if it was disturbed and became airborne. In fact, Stringer told Grace's realtor that the vermiculite materials piled around the Screening Plant were no problem, unless "they got airborne." Tr. (DeShazer) at 5592. And he knew that there was still vermiculite at the Screening Plant as late as 1992 with as much as 3.93% asbestos. GX 597A. But he never told Peronard what he knew. As a result, Peronard and other EPA employees and contractors did not take any precautions during their early investigation, even though they were

coming into contact with asbestos-containing vermiculite. Tr. (Peronard) at 739-40.

As part of its investigation, EPA sent Grace a Request for Information under 15 U.S.C. § 104(e) ("104(e) Request"), seeking answers to some basic questions about the nature and extent of the potential asbestos contamination in Libby. GX 629. Grace and Stringer responded with answers that omitted critical information, and, in some cases, provided blatantly false information. Peronard explained that the purpose of the 104(e) Request, which was apparent in the substance of the questions—to find out "the mechanics of what happened and what was done with wastes or materials that might have the hazardous substance or the contaminants there." Tr. (Peronard) at 898. Peronard also explained that generally it was his practice to rely on the information provided by a company to make emergency response decisions because they "have the best set of information about what they did on their property." *Id*. Specifically, he relied on Grace's answers to EPA's 104(e) Request to prioritize cleanup, investigation and operational decisions at the Libby site. Tr. (Peronard) at 900.

As part of trying to understand the scope of the contamination around Libby, EPA asked Grace a simple question: "Was vermiculite ore or product given to employees or the general public at any such location?" GX 629 (Question 3g); Tr. at 905. Grace's and Stringer's answer was:

> Yes, vermiculite concentrate was available *for employees* to take home for their use in their gardens. Expanded vermiculite was available *for employees* to take home for their personal use. Employees were required to obtain permission from their supervisors to remove vermiculite concentrate or expanded vermiculite. *Grace did not provide vermiculite to the general public*, though throughout the 1970s Grace donated vermiculite mill coarse tailings for use on the Libby High School running track. Grace paid for installation of a rubberized asphaltic running surface in approximately 1981.

GX 629 (emphasis added). This answer was false, misleading and incomplete. As a result, it obstructed and delayed EPA's investigation and cleanup efforts. First, Grace did provide vermiculite to the general public, including during the time that Stringer was the General Manager of the mine. The supervisor of the Screening Plant from 1988 - 1990 admitted that "it was considered normal procedure to allow the public to have access to vermiculite." Tr. (Zwang) at 5013. A long-time Grace employee, who worked through the mine closing and tear down, observed that vermiculite was "regularly available and a lot of people would take it home and use it in their gardens or in their lawns." Tr. (Thom) at 5353; Tr. (Cannon) at 281; Tr. (Peronard) at 1082-85; Tr. (Beagle) at 5035-36. Second, the same Grace employee testified that employees did not need permission to take vermiculite for use in their gardens. Tr. (Thom) at 5303. According to Peronard, this answer led him to believe that any vermiculite give-away "was a controlled activity of some limited scope" and, as a result, his investigation focused on homes of former employees. Tr. (Peronard) at 910. It took him until 2001, after receiving anecdotal reports from members of the community,

to understand that the contamination was much more widespread. Tr. (Peronard) at 911.

But the most troubling aspect of Grace's answer was not what it said, but what it did not say. While Grace admitted that it had provided mill tailings for the high school track in the 1970s, it failed to tell EPA that it had also provided mill tailings at the Middle School track and for the base of an ice rink at Plummer Elementary School. Tr. (Peronard) at 927-28. This omission caused delays in EPA discovering the contamination at the Middle School and Plummer Elementary School. Tr. (Peronard) at 928. Meanwhile, school kids were continuing to be exposed to asbestos-contaminated materials. Peronard observed kids wrestling in the dirt depression of the Plummer ice rink. Tr. (Peronard) at 878. A Plummer Elementary School teacher played daily kickball and football games on the playground into the spring of 2000 during which students ran into the ice rink to retrieve balls. Tr. (Kelsch) at 5112-14; 5117-18; 5131-32. Peronard summed up the effect of Grace's answers on his investigation regarding the locations of vermiculite materials around Libby this way:

> I mean, taking the value reported here, you know, focus less on the community, especially the totality, controlled release, only employees had access to it, less than one percent, otherwise the material is secured. It narrowed the focus of our investigation in the community...

Tr. (Peronard) at 924-25.

EPA asked Grace another simple question: "Did W.R. Grace know that employees regularly left the mine or other W.R. Grace facilities with vermiculite/tremolite dust from the various operations on their clothes?" GX 629 (Question 17). Again, EPA was trying to understand the extent of the problem, and specifically the extent of the potential health effects. Grace's answer was unequivocal: "No, Grace employees did not regularly leave the mine with vermiculite/tremolite dust on their clothes." *Id.* Peronard explained that the dust being tracked home on workers' clothes, based on Grace's answer, "did not strike us as a being a priority issue." Tr. (Peronard) at 932. In reality, as a Grace employee described, "[a]ll the guys that worked" for Grace during the tear down of the mine went home with dust on their clothes. Tr. (Thom) at 5304; *see also* Tr. (Whitehouse) at 1613-14, 1699-1700; DX 6595; Tr. (Zwang) at 5017; Tr. (Beagle) at 5038. And even Stringer admitted in a letter to the community in March 2000 that he was aware of "a health problem associated with exposure to asbestos for both employees *and their families* when the mine and mill were operating." GX 629B. Of course, the health problem associated with workers' families was directly caused by asbestos dust tracked home by the workers.

When EPA asked Grace what it had done to prevent the transport of dust to the homes of their employees, Grace incorporated earlier responses and added the fact that it "consistently treated the roadway to the mine with various materials in an effort to minimize the dust

which at times may be created by vehicular traffic." GX 629; Tr. (Peronard) at 933. What Grace failed to mention was that it also sanded Rainy Creek Road, a road regularly accessed by the public, with asbestos-contaminated mine tailings. Tr. (Peronard) at 935; Tr. (Dofelmire) at 5055-56. Likewise, when asked if Grace conducted "sampling of any environmental media to determine if hazardous substances were released" from any of its facilities, Grace provided information about PCB-contaminated soils but no information regarding its extensive asbestos sampling. GX 629; Tr. (Peronard) at 940.

The pattern of Grace's answers to EPA's 104(e) Request is abundantly clear in hindsight—minimize, omit, and deny. As a result, Peronard's and EPA's investigation was delayed, which, in turn, resulted in Libby residents being further exposed to asbestos.

Grace's obstruction of EPA's investigation and cleanup efforts did not end with its misleading and incomplete answers to EPA's 104(e) request. During the course of EPA's response, Peronard realized that the mine was the most logical place to dispose of asbestos-contaminated materials that EPA was finding around Libby. Tr. (Peronard) at 835-36. Peronard discussed this long-term disposal solution with Grace and the Kootenai Development Corporation ("KDC"). *Id.* Specifically, Peronard discussed an arrangement whereby Grace would buy back the mine site from KDC since Grace would be the primary party responsible for the cleanup. Tr. (Peronard) at 837. In the course of this negotiation,

Peronard dealt with Stringer on behalf of Grace, as well as attorneys for Grace. Tr. (Peronard) at 838. According to Peronard, "there was no question where we were going to take the material and what we were going to do with it." *Id.*

On July 14, 2000, the transaction that Peronard had proposed - that Grace would assume ownership of the mine site - occurred. GX 635. Four days later, Grace notified EPA by letter that it would no longer have access to the mine site for any purpose. GX 636; Tr. (Peronard) at 841. Peronard was surprised by Grace's denial of access since up to that point Grace knew what EPA intended to do with the contaminated materials and "had raised no issues with what [EPA] proposed." Tr. (Peronard) at 840-41. Peronard explained that Grace's stated reason in its letter for denying access—that the land was a rugged, mountainous mine site and parts [were] still subject to reclamation—had never come up as a consideration during prior discussions with Grace, and that in his opinion, the mine site had easy access. In fact, Grace had been using the mine site for 70 years and that "they had a nice road, had good areas to work." Tr. (Peronard) at 843-44.

As a result of Grace's denial of access to the mine site, EPA's investigation and cleanup efforts were delayed and hindered. EPA had to stop sampling investigations planned for the Flyway and the Bluffs properties, which were now owned by Grace. Tr. (Peronard) at 844.

EPA continued excavation work but was forced to stockpile contaminated materials at the Screening Plant. Tr. (Peronard) at 845; GX 750, 751. At the same time Grace denied EPA access to the mine site to dispose of contaminated materials, Grace was excavating contaminated soil at the Export Plant and hauling it up Rainy Creek Road to the mine site. Tr. (Peronard) at 867-88. Peronard estimated that the denial of access, due to the short construction season in Libby, pushed the cleanup out "at least two field seasons after this." Tr. (Peronard) at 849.

In early 2002, Peronard and the EPA response team was proposing to remove the Zonolite Attic Insulation ("ZAI") from homes in Libby. On April 10, 2002, Grace sent a letter to the administrator of the EPA which provided further false and misleading information: "Grace's expanded vermiculite which was used in ZAI poses no risk to human health or the environment;" ". . .[ZAI] contains biologically insignificant amounts of respirable asbestos fibers;" ". . . it is reasonable to expect that disturbance of [ZAI] will not result in hazardous levels of airborne asbestos fibers;" and ". . . there is no credible reason to believe that ZAI has ever caused an asbestos related disease in anyone who has used in his/her home." (GX 644); Tr. (Peronard) at 988.

This letter from Grace, which clearly contained statements at odds with the results of Grace's internal ZAI product testing as far back as 1977, caused Peronard to spend a significant period of time generating

sampling results and understanding the exposures to people in Libby from their exposures to ZAI. Tr. (Peronard) at 992-93. This time and money spent investigating ZAI delayed Peronard's other clean-up efforts. Tr. (Peronard) at 993. For all the foregoing reasons, Defendants' Rule 29 motions on the Obstruction Counts V-VIII should be denied.

VI. Conclusion

For the foregoing reasons, the United States respectfully requests the Court deny each of Defendants' Rule 29 Motions for Judgment of Acquittal.

DATED this 25th day of April, 2009.

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CERTIFICATE OF SERVICE
L.R. 5.2(b)

I hereby certify that on April 25, 2009, a copy of the foregoing document was served on the following persons by the following means:

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